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December 6, 1995

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: 220 MHz Radio Service Modification and
Construction Extension Notice of Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, we are submitting herewith two copies of a letter delivered today to Chairman Hundt and to each of the individual Commissioners regarding the Order in the Fourth Notice of Proposed Rulemaking, PR Docket No. 89-552, GN Docket No. 93-252, FCC 95-381 (August 21, 1995), and the November 1, 1995 AMTA request for extension of time to construct non-nationwide 220 MHz licenses. Please include these materials in the above-referenced docket proceedings.

Please direct any questions regarding this matter to the undersigned.

Sincerely yours,

Robyn G. Nietert

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December 6, 1995

Chairman Reed Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Re: 220 MHz Radio Service Modification
and Construction Extension

Dear Chairman Hundt:

This law firm represents Incom Communications Corporation, North American Mobile Systems, Inc., In Touch Services, and Global Acquisition Corporation. All of these companies have constructed and manage 220 MHz SMR facilities. We are writing to bring to your attention the critical importance of two items currently before the Commission: The Order in the Fourth Notice of Proposed Rulemaking, PR Docket No. 89-552, GN Docket No. 93-252, FCC 95-381 (August 21, 1995), and the November 1, 1995 AMTA request for extension of time to construct non-nationwide 220 MHz licenses that will not seek modification.

Regarding the proposed rules for modification of 220 MHz licenses, the Commission has pending before it two alternative approaches. The AMTA proposal is universally supported by the 220 MHz industry. It is a compromise between the industry's critical business concerns and the FCC's concerns regarding "spectrum land grabs" by existing licensees. The FCC's proposal, however, does not take into consideration the critical business issues raised by the industry -- its proposal would cripple this emerging competitor that is [illegible] providing the public with low cost, dispatch services. Likewise, on the issue of extending the construction deadline for systems which do not require modification, the FCC has pending before it two proposals: One submitted by AMTA, which again is universally supported by the 220 MHz industry, and an FCC proposal for a short 30-day extension, which will not provide any meaningful relief and which ignores the fact that industry members cannot intelligently decide where to construct facilities until the modification rule is finalized.

All of the manufacturers, system operators, managers and licensees who have participated in these two matters have strongly voiced their opposition to the FCC's proposals for good reason: The FCC's proposals will damage the industry so severely that it may never recover — all in the name of "protecting" the spectrum for some future, as yet unidentified, auction bidders. The FCC's proposals will not provide the relief the industry has demonstrated is warranted, they are unsupported by any record and they fly in the face of the agency's own precedential action regarding other encumbered spectrum. These issues are more fully explained in the attached "Synopsis of Industry Support for AMTA's Position on 220 MHz Modifications and Construction Extension".

From the legal standpoints of due process and fundamental fairness, it is important to emphasize that the FCC has provided expansive modification opportunities to both MDS licensees and 900 MHz licensees prior to the auctioning of these encumbered spectrum blocks. Yet the Commission is denying a similar meaningful modification opportunity to incumbent 220 MHz licensees. There is no record to support this discriminatory treatment of the 220 MHz radio service.

Like the MDS licenses and the 900 MHz licenses, the 220 MHz licenses were awarded via a lottery process and there exists no valid reason for discriminating against these lottery winners (who abided by the FCC rules in place at the time) in favor of some as yet unidentified spectrum bidders. The established FCC precedent demands that the same substantive pre-auction modification rights accorded MDS and 900 MHz SMR licensees should be accorded 220 MHz licensees.[1] In light of the FCC's substantial precedent and the compelling facts of the instant situation, adoption of the FCC's proposals on the modification rules and construction extension could only be viewed as arbitrary and capricious.

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[1] The FCC has also established clear precedent on defining the substance of a meaningful modification rule. In the cellular service the FCC modified its own rules to enlarge cellular service areas once the cellular service was operational and demonstrated actual coverage in a real-world environment that exceeded the theoretical calculations contained in the FCC's rules. In the same situation in the 220 MHz arena, the FCC is seeking to contract the service area for a technology that has demonstrated it can provide service in a real-world environment that far exceeds the theoretical calculations in the existing rules. Again this appears to be an effort to "preserve" 220 MHz service areas for future spectrum auction winners to the detriment of existing licensees who are currently serving the public interest.

The tortured regulatory history of the 220 MHz radio service has been well documented and explained in numerous submissions to the FCC so it need not be reiterated herein. Now it is requested that as the decision nears on these two critical issues you consider the matters summarized herein and support the AMTA position on the 220 MHz modification rule and construction extension request.

Thank you for your attention to this matter.

A copy of this letter is being filed with the Secretary's office as required by the FCC's rules.

Respectfully submitted,

Robyn G. Nietert

Enclosure

cc (w/encl.): Ruth Milkman, Esq.

Synopsis of Industry Support for AMTA's Position
on 220 MHz Modifications and Construction Extension

Pending before the FCC are two items of critical importance to the viability of the entire 220 MHz radio industry:

- The Fourth Notice of Proposed Rulemaking proposing modification standards for 220 MHz systems and an extension of time to construct systems which require modification.

- AMTA's November 1, 1995 request for an extension of time to construct non-modified 220 MHz systems, which would parallel the same extension of time proposed by the FCC for modified systems in the 4th NPRM.

The 220 MHz industry is at a crucial turning point concerning whether or not it will emerge as a viable low cost provider of dispatch service to the nation's business users. The FCC's decision on these two items will have critical impact on the future of the industry. For the following policy and legal reasons, the FCC is urged to adopt the AMTA position on these items.

The Order on 4th NPRM should adopt the AMTA position on the modification rule for the following reasons:

- 220 MHz is the only service in the history of the FCC for which the original permitees were never given the opportunity to modify to relocate before the initial construction deadline in order to maximize system design; radio and television broadcasters, cellular, PCS, 800/900 MHz, SMRs, MMDS and paging companies were all given an opportunity to maximize their transmit locations and system operating parameters after completing the initial application process.

- Singling out 220 MHz as the only radio service to be denied a meaningful modification opportunity is arbitrary and capricious. It is blatantly anti-competitive: The emerging 220 MHz radio service must compete for dispatch customers with the established 800/900 MHz radio service, which has had ample opportunity to maximize system design by modifying transmitter locations to provide wide-area coverage, redundant coverage of high density traffic corridors, and the like. While these competitive services modified operations to enhance their competitive position, 220 MHz modifications were prohibited entirely.

- At the time the FCC accepted 220 MHz applications, the rules in effect for the incumbent SMR services, (utilizing various spectrum allocations) allowed virtually unrestricted modification of transmitter sites,

subject to frequency coordination. The FCC did not give 220 MHz applicants any notice that this modification policy would not apply to the 220 MHz service. Instead of opening a window applying this modification policy to 220 MHz applicants after the processing of the initial applications, the FCC instituted a freeze on modifications.

- The "temporary" freeze on 220 MHz modifications has been in effect over 4 1/2 years - - ever since the applications were submitted. Until the summer of 1995 the FCC gave no inkling that it intended to propose rules to severely limit the ability of 220 MHz licensees to relocate before constructing.

- Substantively, the FCC's 220 MHz modification proposal is so restrictive that it is meaningless, thus it is unanimously opposed by every sector of the 220 MHz industry; procedurally, it is inexcusably burdensome and imprecise to the point it will engender endless litigation as to whether or not proposed modifications impermissibly redefine the licensee's theoretical dBu contour.

- The FCC's 220 MHz modification proposal ignores FCC precedent of adopting rules that reflect the real world performance of a particular radio service e.g., initial cellular reliable service contours based on theoretical calculations were later modified by the FCC to expand protected cellular service areas based on the input from actual operating systems. Likewise, in MDS the FCC recently more than doubled protected service areas for incumbent licensees. Now that the 220 MHz service is operational and real world input demonstrates that the systems are outperforming the FCC's previous theoretical calculations, the FCC is seeking to shrink the protected service area for 220 MHz licensees.

- The FCC's modification proposal is completely contrary to the precedent the FCC has established regarding incumbered spectrum auctions. Prior to the November commencement of the MDS auction (the first encumbered spectrum auction) the FCC permitted licensees an unrestricted opportunity to upgrade and relocate facilities so as to maximize system operations. (It also lifted a three year ITFS filing freeze, which further enhanced opportunities for MDS incumbents). Similarly, with respect to 900 MHz SMR, the FCC permitted unrestricted modifications in the DFAs and further enhanced incumbent rights by granting primary status to secondary sites for certain prior filed applications. The FCC's precedent permitting these incumbents the

flexibility to maximize system design before instituting auctions is indirect conflict with what the FCC is proposing for 220 MHz licensees.

- Virtually the entire 220 MHz radio industry has supported the AMTA modification proposal. It provides the necessary flexibility for licensees to relocate while being sufficiently restrictive to guard against a "spectrum land grab" and preserve unutilized 220 MHz spectrum for auctions.

- Without the ability to provide the reasonable service coverage that the AMTA modification proposal will make possible, the 220 MHz industry will not be able to attract subscribers. The industry's two manufacturers will not be able to sell equipment and the industry will come to a halt. This will seriously devalue the spectrum for any future auctions, not to mention kill an emerging competitive, low cost dispatch service that has already begun to serve the public.

- AMTA's proposal is a compromise which protects against the projected abuses feared by FCC staff. However, the FCC's proposal ignores entirely the critical issues raised by the industry - it is unsupported by any record in its overly restrictive approach to addressing the staff's undocumented speculation that 220 MHz licensees are attempting to engage in a "spectrum land grab".

The FCC should adopt the November 1, 1995 AMTA proposal to extend the construction deadline for non-modified 220 MHz systems to be concurrent with the FCC's own proposal for the extension of construction deadlines for modified systems as set forth in the Fourth Notice of Proposed Rulemaking:

- The current construction deadline for 220 MHz facilities is December 31, 1995.

- The FCC was to have acted much sooner on the modification rule so that licensees could know whether or not desired modifications to licenses would be permissible.

- Because the FCC has not acted timely on the modification rule, licensees have not been able to make rational business decisions as to where and how to build and whether or not the FCC's modification rule will impact their decisions on appropriate transmitter sites.

- If the FCC does not extend the time to construct non-modified systems, it is likely that every single licensee will be forced to seek a modification in order to remedy the inequity of having to decide to build before knowing

what the rules on transmitter relocation are. Such a result will cause a totally unnecessary administrative burden for the FCC in processing such modification applications.

- Extending the construction deadline for non-modified systems for only one month would be arbitrary and capricious. Businesses have not been able to make determinations as to where certain of their systems can be built. It is only when the modification rules are in place that such a determination can be made. If the modifications rules are adopted some time in December, all the licensees nationwide will have only a few weeks in which to construct systems that do not fall within the FCC's modification guidelines.

- It is irrelevant that past construction extensions have been granted for non-modified systems; the deadline for construction must be tied to some rational period of time after the industry is informed of the rule for modifying system locations - so long as no substantive rules are in place, the licensees are in regulatory limbo and it is simply not prudent to construct.